Supreme Court, U.S.
FILED
NOV 22 2010
OFFICE OF THE CLERK

No. 10-534

IN THE

Supreme Court of the United States

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Petitioner,

v.

ZEV LAGSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETERSEN INTERNATIONAL UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE *AMICUS CURIAE* [1]

This *Amicus* Brief is filed on behalf of Petersen International Underwriters ("Petersen"), an underwriting firm which focuses on providing insurance for extraordinary risks that the traditional market cannot or will not insure.

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of *amicus* briefs, including this one.

By way of experience, Petersen is well aware that contractual arbitration, whether through the American Arbitration Association or otherwise, plays a vital role in the amelioration and resolution of commercial disputes. Arbitration is cost effective and relieves the courts of burdens they would otherwise have to assume.

Much like the courts, trust and confidence in the integrity and impartiality of the process are necessary underpinnings to the willingness of parties to take part in arbitration. If that trust is impeached, or there is even the appearance of untrustworthiness or lack of transparency and integrity, arbitration will be avoided by sophisticated commercial parties.

Amicus has a vital interest in the continuing ability of the insurance market to rely upon and utilize commercial arbitration as a means of dispute resolution. Absent trust in the process, that cannot be accomplished.

Reliance on the integrity of the process requires reliance on the enforceability of arbitration agreements as written and the certainty that any potential conflict or relationship between the arbitrators themselves will be fully disclosed in order to have confidence in a fair and impartial bearing.

Moreover, if the insurance market comes to the conclusion that the Federal Arbitration Act performs as a bar to any judicial review of a perceived flawed arbitration award predicated on lack of disclosure, arbitration will cease to be a forum for dispute resolution that the insurance industry is willing to adopt.

The Ninth Circuit's decision in the instant case undermines the insurance industry's faith in the Federal Arbitration Act's fairness and impartiality.

Amicus thus brings its concerns to the Court's attention.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE INTEGRITY OF THE ARBITRATION PROCESS

From the point of view of *Amicus*, the most compelling defect, and the one with the most far ranging consequences, in the decision below is the Ninth Circuit's preclusion of a federal court's ability, in the appropriate egregious circumstances, to vacate an award because of the arbitrators' failure to disclose relationships and dealings between themselves which rise to the level of casting doubt on the fairness of the process. The Ninth Circuit's parsimonious interpretation of the arbitrators' disclosure obligation cannot be squared with this Court's materially broader conception of that obligation. Moreover, contrary to the Ninth Circuit's view, the burden of disclosure, from a fairness and cost benefit point of view, should be on the potential arbitrators. A requirement that the parties undertake an investigation is simply not cost effective and such an investigation is likely to be less complete.

From a broader point of view, bias refers to a "predisposition to decide a cause on an issue in a certain way, which does not leave the mind perfectly open to conviction." *Pacific and Southwest Annual Conference of United Methodist Church v. Superior Court*, 82 Cal.App.3rd 72, 86 (1978).

Bias can certainly flow from a relationship with a party, which is why disclosure of such a relationship is required.

It is also the perception of bias which must be eradicated. Where a history between arbitrators is at the level found here, the perception of bias is sufficient, especially where a judicial fitness inquiry was involved.

Given the numerous ways bias can be present, the Ninth Circuit's narrow interpretation of the disclosure duty under the FAA prevents the parties from using the disclosure duty as a means to ferret out even obvious biases and predispositions.

Under the Ninth Circuit's rationale, an arbitrator with a relevant history can easily avoid the Ninth Circuit's limited disclosure requirements by simply stating he has no prior dealings with a party or a party's counsel, while simultaneously failing to reveal multiple professional, commercial, personal, and, as here, ethical histories with another panel member. The opportunity for unfairness is patent.

In *Commonwealth Coatings Corp. v. Continental Casualty*, 393 U.S. 145 (1968) this Court struck precisely the right tone in phrasing the disclosure obligation in terms of dealings, rather than relationships. Dealings have both positive and negative connections.

Neutrality is best served when potential arbitrators are up front about any sort of past dealings, whether with a party, counsel, or other panel member which might hint at or suggest an inability to act impartially.

Significantly, the very act of disclosure is more often than not sufficient to dispel any concern and reenforces ones' confidence in the process.

By contrast, the failure to disclose serves, at a minimum, to suggest that the undisclosed dealings may very well be indicative of an inability or unwillingness to act impartially or independently.

Accordingly, the Ninth Circuit's decision conflicts with *Commonwealth Coatings*, *supra*, by relieving arbitrators of the duty to disclose prior dealings with each other.

In the instant case, from the point of view of *Amicus*, who must rely on the integrity of the Arbitration process in future commercial disputes, or abandon its use, it matters little whether there was actual malfeasance or bias on the panel. Rather, it is the perception of bias and lack of impartiality which destroys a third party's confidence in the system and imparts a reluctance to future use of this method of commercial dispute resolution.

If there can be no recourse to the courts to review of such circumstances, there is a chilling effect on sophisticated entities' agreement to arbitrate disputes.

It is apparent from the record that two of the three arbitrators had dealings with each other that suggest a predisposition to act in tandem, rather than independently. It is clear that the two arbitrators have a long shared history. It is equally clear that a substantial part of that shared history revolved around claims of bias and judicial misconduct.

The very existence of this history casts substantial doubt on the prospect that a fair impartial hearing would take place, and fairness compels disclosure.

Under the standard put forth by the Ninth Circuit, the disclosure obligation is gutted, doing great damage to public perception of the arbitration process.

II. THE NINTH CIRCUIT'S DECISION HANDS ARBITRATORS THE POWER TO REWRITE THE PARTIES' CONTRACT, FRUSTRATING ALL CONTRACTUAL EXPECTATIONS

In addition to the evisceration of the disclosure obligation, the Ninth Circuit's decision hands arbitrators unreviewable discretion to increase the duration and expense of the arbitration.

Jurisdiction for arbitrators is confirmed by the parties' agreement, and the letter of the agreement, including time limitations, defines the jurisdiction.

Under the Ninth Circuit's rationale, once initial jurisdiction is extended, the arbitrators are free to extend their jurisdiction beyond the contractual agreement of the parties, and the parties are powerless to enforce any previously negotiated and agreed upon jurisdictional limits.

The parties define the arbitrator's power by their agreement. In *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 130 S. Ct. 1758, 1774 (2010), the Court explained "an arbitrator derives his or her powers from the parties' agreement" and the "parties are generally free to structure their arbitration agreements as they see fit . . . and may agree on rules under which any arbitration will proceed." Permitting arbitrators to unilaterally expand that power beyond the agreement undermines confidence and reliance in the process. *Amicus* expects, in agreeing to submit matters to arbitration, that the agreed upon boundaries will be adhered to. If not, arbitration becomes an unattractive alternative to litigation.

III. THE NINTH CIRCUIT'S DECISION ABANDONS THE COURTS' OBLIGATION TO POLICE THE PROCEDURAL FAIRNESS OF ARBITRATIONS CONDUCTED UNDER THE FEDERAL ARBITRATION ACT

In order for commercial entities such as *Amicus* to continue to rely on contractual arbitration as an efficient, cost effective way of resolving disputes, it must be assured that the arbitration agreements it enters into are enforced as written in conformity with the expectations of the parties.

The decision of the Ninth Circuit is clearly in conflict with the notion of such reliance, and conflicts with the FAA, 10 U.S.C. Section 10(A) which seems to provide the courts with the power to rein in arbitration excess.

It is essential that in the event arbitrators step substantially beyond contractual arbitration boundaries that the courts have the jurisdiction and power to reset the boundaries. One of the attractions of the commercial arbitration process is that the parties are able to set the parameters and issues to be decided. *Stolt-Nielsen*, 130 S.Ct. at 1774. In the event arbitrators decide to unilaterally disregard the parties' agreement simply because they believe they know better, or wish to do so for any other reason, the courts must have the authority to roll back the unconsented extra-jurisdictional exercise of authority by the arbitrators.

The instant case is a particular illustration of the hazard to the insurance industry if arbitrators are allowed to exceed their jurisdiction.

It is chiefly within the context of the insurance industry that a tortious breach of contract founded

upon a breach of the covenant of good faith and fair dealing can result in an exemplary damages award. *See, e.g. Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 103, 900 P.2d 669, 680 (1995).

This represents a substantial commercial exposure, and given that contractual arbitration provides arbitrators with the power to significantly damage an insurer, the need for trustworthiness, transparency and full disclosure is underscored. The opinion of the Ninth Circuit is a strong disincentive to continue to rely on contractual arbitrations as a means to resolve insurance disputes.

The arbitration system has many benefits. However, if the Ninth Circuit's decision is allowed to stand, continued usage of the system is perhaps fatally imperiled.

CONCLUSION

For the foregoing reasons, together with those stated in the Petition, *Amicus* respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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